Filed 6/7/16 In re H.L. CA4/2

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| In re H.L. et al., Persons Coming Under the Juvenile Court Law. | |
| SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>K.L.,<br><br>Defendant and Appellant. | E065232<br><br>(Super. Ct. No. J261971-73)<br><br>OPINION |

APPEAL from the Superior Court of San Bernardino County. Steven A. Mapes, Judge. Affirmed.

Rich Pfeiffer, under appointment by the Court of Appeal, for Defendant and Appellant.

Jean-Rene Basle, County Counsel and Jamila Bayati, Deputy County Counsel, for Plaintiff and Respondent.

This dependency case arises from the death of appellant K.L.'s three-month-old son, J.R. After finding K.L. (mother) caused J.R.'s death through abuse or neglect within the meaning of Welfare and Institutions Code section 300, subdivision (f), the juvenile court removed mother's other children (her three daughters, "the girls") from her custody.[1] The court placed two of the girls, H.L. (age 8) and E.W. (age 10), with their biological fathers. As to the oldest daughter, A.C. (age 12), the court bypassed reunification services to mother, but granted them to her biological father, Forrest, and set a six-month review hearing.[2]

Mother raises two arguments on appeal. She argues the juvenile court's decision to deny her oral request for continuance on the day of the jurisdiction and disposition hearing was an abuse of discretion. Next, she argues respondent San Bernardino County Children and Family Services (CFS) failed to provide adequate ICWA[3] notice. Mother does not challenge the sufficiency of the evidence supporting the court's factual findings or disposition orders. For the reasons discussed below, we affirm.

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[1] Welfare and Institutions Code section 300, subdivision (f), provides that a child is within the jurisdiction of the juvenile court if "[t]he child's parent or guardian caused the death of another child through abuse or neglect."

[2] None of the fathers is a party to this appeal.

[3] The Indian Child Welfare Act. (25 U.S.C. § 1901 et seq.)

## I

## FACTUAL AND PROCEDURAL BACKGROUND

A. *Background*

On September 2, 2015, three-month-old J.R. was rushed to the Naval Hospital in Twentynine Palms. He was in critical condition and was not breathing. After the ambulance staff provided cardiopulmonary resuscitation (CPR) and J.R. began breathing on his own, staff transported him to Loma Linda University Medical Center (LLUMC). The doctor pronounced J.R. brain dead on September 3, and the child passed away on September 4.

CFS reports detail the interviews with mother and her family following J.R.'s hospitalization, as well as medical staff's observations and impressions. Mother and James Sr., J.R.'s biological father, gave similar accounts to LLUMC staff and the CFS social worker assigned to the case. On his way to work in the early morning of September 2, James Sr. dropped J.R. off with mother who was finishing her night shift at Jack in the Box. Around 6:30 a.m., mother returned home with J.R., propped him up diagonally on one of the couch pillows, and went to sleep next to him. At 12:30 p.m., mother woke to use the restroom and while in the bathroom noticed her shirt was wet. She told the social worker, "[A]ll I could think of is that I rolled over on him." She went back to check on J.R. and found him not breathing. She performed CPR "hard enough to get to his heart" and called 911. On the way to the Naval Hospital, J.R. struggled to breathe and began having seizures.

When the family was at LLUMC, a hospital social worker overheard the girls say that a few days earlier they had pulled J.R. out from under something while mother was sleeping and found cords around his neck. E.W. (then age 9) told the CFS social worker that mother thought she had slept on J.R. E.W. said this was her "third brother that died" and she was afraid mother would "break down and hurt everybody."

The social worker spoke to Dr. Sheridan-Matney, the forensic medical doctor investigating J.R.'s death. Dr. Sheridan-Matney suspected child abuse. She found blood in J.R.'s head, retinal hemorrhages in his eyes, and blood in his abdomen.

CFS took the girls into protective custody, placing H.L. with her father, and E.W. and A.C. with their maternal aunt. On September 9, 2015, CFS filed dependency petitions for each of the girls. Among other things, CFS alleged mother had caused J.R.'s death through abuse or neglect within the meaning of section 300, subdivision (f).[4]

At the detention hearing on September 10, 2015, the juvenile court ordered the girls detained from mother's custody, in the same homes where CFS had placed them on an emergency basis.

[4] Undesignated statutory references are to the Welfare and Institutions Code.

B. *Jurisdiction/Disposition Report*

CFS recommended the court place H.L. and E.W. with their fathers and dismiss their cases, order family reunification services for A.C.'s father, and apply reunification services bypass to mother under section 361.5, subdivision (b)(4).[5] During an interview, mother told the social worker she had lost a son, D., to sudden infant death syndrome (SIDS) in 2012. She said D. and J.R. were the same age (three months 11 days and three months 10 days) when they passed away. The maternal aunt reported, in addition to losing D. and J.R., mother had five miscarriages and a stillborn baby.

The social worker spoke with LLUMC's public health nurse Mahea Hite about SIDS. The nurse explained that although the cause is unknown, there are certain known risk factors, such as sleeping in the same bed (co-sleeping) and on soft surfaces. The nurse said all mothers are advised about the SIDS risk factors after giving birth. She also said a medical professional would have discussed the risk factors with mother when D. died of SIDS in 2012. The social worker asked the nurse why mother's shirt would have been wet after her nap with J.R. and the nurse hypothesized J.R. had been drooling on mother because he was suffocating.

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[5] Under section 361.5, subdivision (b)(4), a juvenile court need not provide reunification services to a parent who "caused the death of another child through abuse or neglect."

In response to questions about the girls finding J.R. with cords around his neck, mother admitted J.R. would sleep in the same bed with her, between her and James, Sr. She "like[d] sleeping next to her son and feeling his breath on her." She would place a pillow on the floor next to the bed, presumably so it would break J.R.'s fall if he rolled off. On this particular incident, " '[J.R.] did fall off of the bed,' but he fell on to the pillow and the cord was from an alarm clock, but it was next to his neck, not wrapped around his neck." The social worker viewed mother's story as "evidence that the mother was again co-sleeping with the infant, which increases the risk of SIDS."

An LLUMC social worker reported J.R. had "many retinal hemorrhages in both of [his] eyes" and that retinal hemorrhages are not associated with SIDS but "are usually indicative of a child who has been severely shaken." LLUMC's records for September 2, 2015 reflect J.R. was "intubated with a strong suspicion of the beginnings of herniation and anoxic brain injury. . . . NAT [(nonaccidental trauma)] is suspected." The records for September 3 state J.R. had "[a]cute encephalopathy secondary to hypoxia vs head trauma vs bleed."

J.R.'s autopsy report was not completed by the time of the jurisdiction/disposition report and the investigations, criminal and medical, were ongoing.

The social worker made the following assessment: "The autopsy report for [J.R] is not necessary for [me] to recommend the children are not safe in the mother's care. She knew that she should not sleep in the same bed with an infant. She admitted that she slept on a bed with him and he fell off and [that she slept with him] on the couch and he

stopped breathing. There is a basis for No Family Reunification for the mother under WIC 361.5 (b)(4)."

C. *Continuances and Addendum Report*

At the initial jurisdiction and disposition hearing on October 1, 2015, mother's counsel asked for a six-month continuance in order to obtain J.R.'s autopsy report. The court replied that six months was "not going to happen," but it would continue the hearing for one month.

CFS filed an addendum report in advance of the continued hearing which included reports from the Children's Assessment Center's interviews with the girls. The girls recounted the circumstances of their brother D.'s death in 2012, and all three confirmed mother would sleep in the same bed with J.R.

A.C. told the interviewer D. was on a heart monitor because he had breathing and heart problems. She recalled it was "June 10" when D. passed away. She was awakened by the sound of ambulances and walked out of her room to find someone performing CPR on D. D.'s father (mother's then boyfriend) was " 'blaming mommy' " for D.'s death. Mother had "tried taking D. off his heart monitor the day of June 10." A.C. thought mother may have tried taking D. off his heart monitor on other days, but was not sure.

E.W. reported she heard mother " 'swear' " she " 'laid her body on [J.R.] on accident because she is a wild sleeper [and] moves around sometimes.' " Mother swore her arm and " 'a little bit of her body' " was on J.R. while they napped on the couch.

E.W. recounted a time " 'early in the morning' " when she awoke to J.R. crying and found him on the floor in the room where he slept with mother and James, Sr. There were two cords, one for a charger and one for a heating pad, and one was on J.R.'s chin. E.W. gave J.R. to mother who "yelled at [E.W.'s] grandma" for not checking on J.R. when he was crying.

E.W. also recalled D.'s death. D. had breathing problems "and they put him on this little thermonitor [*sic*] that helps to breathe and then it was unplugged." D. was "blue too," like J.R. when he died. After D. died, mother and D.'s father fought. D.'s father called mother "the baby killer" and was "really mad."

At the continued hearing in November 2015, mother's counsel requested another continuance and the court ordered the hearing continued to December. At that hearing, the court continued the matter to January 2016, based on minors' counsel's request for time to review discovery she had just received from LLUMC.

D. *Jurisdiction and Disposition Hearing*

At the start of the January 2016 hearing, mother made a (third) request for continuance. She wanted J.R.'s autopsy report, which counsel expected to be ready in about six to eight weeks. Counsel for H.L.'s and E.W.'s fathers argued there was no guarantee the autopsy report would be ready within that time frame and that CFS reports contained sufficient evidence for the court to rule on the petition's allegations. Counsel for CFS joined noting, "We don't know when those reports will come, and historically, they do come in much later."

The court responded: "I am not inclined to continue. I feel like we have been continuing this. . . . It's been a while. There's a lot of information already in here. I don't know what the protocol's going to add." The court noted it had just received notes from LLUMC "related to eyes." Minors' counsel responded the document was a copy of J.R.'s retinal hemorrhaging chart and requested permission to attach the chart to the jurisdiction/disposition report. No parties objected and the court granted the request.

Mother objected to the recommendations in the jurisdiction/disposition report, but waived her right to an evidentiary hearing. Her counsel stated she had advised mother "she can take classes on her own and perhaps we can file a [section] 388 [petition] at a later time."

The court sustained all of the allegations against mother, including the section 300, subdivision (f) allegation that her abuse or negligence caused J.R.'s death. The court placed H.L. and E.W. with their fathers and dismissed those cases with family law orders granting mother supervised visits. As to A.C., the court found mother fell under section 361.5, subdivision (b)(4) and bypassed reunification services. The court ordered family reunification services for Forrest, permitted mother supervised visits, and set A.C.'s six-month review hearing for July 2016.

## II

## DISCUSSION

A. *Mother's Request for Continuance*

Mother contends the juvenile court erred in denying her request for a continuance in order to obtain the autopsy report. We conclude the court's ruling was reasonable.

"Continuances are discouraged in dependency cases" (*In re Giovanni F.* (2010) 184 Cal.App.4th 594, 604) and can be granted "only upon a showing of good cause." (§ 352, subd. (a).) (See *In re Karla C.* (2003) 113 Cal.App.4th 166, 179 ["Courts have interpreted this policy to be an express discouragement of continuances"].) "[N]o continuance shall be granted that is contrary to the interest of the minor. In considering the minor's interests, the court shall give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements." (§ 352, subd. (a).) Absent "exceptional circumstances," if a child is detained the dispositional hearing must be completed within 60 days of the detention hearing. (§ 352, subd. (b).) We review the denial of a continuance for abuse of discretion. (*In re Giovanni F.*, *supra*, at p. 605.)

"[W]e evaluate the court's reasonableness as of the time it made its decision." (*In re Karla C.*, *supra*, 113 Cal.App.4th at p. 180.) When mother orally requested the continuance at the outset of the January 2016 hearing, she had been on notice of the hearing date for over a month. By this time, the 60-day deadline in section 352,

subdivision (b) had passed (the girls were detained on September 10, 2015) and there was only conjecture as to when the autopsy report would be available. Mother's counsel suggested six to eight weeks but counsel for CFS said autopsy reports typically arrive "much later." Under either estimate, the court would have to continue the hearing well past the 60-day deadline in order to wait for the report.

A continuance more than 60 days past detention requires good cause and exceptional circumstances, neither of which mother demonstrated to the juvenile court. Mother was aware as early as October 1, 2015, when she first asked for a continuance, that the autopsy report might not be available in time for the hearing. Despite this knowledge, she made no attempt in the intervening months to subpoena the coroner or otherwise try to obtain additional medical information regarding the cause of J.R.'s death. It is difficult to see how mother was prejudiced by the court's ruling when she made no effort to obtain the evidence through some other channel and waived her right to an evidentiary hearing.

Mother did not provide the juvenile court with a single reason to wait for the autopsy report. The extent of her request was: "At this time we don't have [the autopsy report] yet." Because she failed to identify any exceptional circumstances to justify a continuance and because the girls were "entitled to a prompt resolution of [their] custody status" (*In re Giovanni F.*, *supra*, 184 Cal.App.4th at p. 605; accord, *In re Ninfa S.* (1998) 62 Cal.App.4th 808, 811), we conclude the court acted reasonably in denying her request. (See *In re Karla C.*, *supra*, 113 Cal.App.4th at p. 180 [no abuse of discretion in denying

continuance when requested paternity test results would have come back weeks past the 60-day deadline].)

On appeal, mother contends the autopsy report might have contained evidence "critical" to the court's decision whether to bypass reunification services under section 361.5, subdivision (b)(4). She supports this argument by asserting the cause of death "was not nearly as obvious as [CFS] and court believed *or the autopsy report could have been obtained much sooner*." This is pure conjecture. The record contains no evidence as to why the report was not available or whether the wait in this case was any longer than usual.

The record does contain, however, substantial evidence to support the court's bypass finding. Putting aside the evidence of nonaccidental trauma, the evidence in CFS reports, which mother did not contest below or on appeal, demonstrates that, at the very least, mother's *negligence* caused J.R.'s death.

Co-sleeping with an infant is negligent because it places the infant at an increased risk of SIDS and of being accidentally suffocated by the parent during sleep. Mother admitted she had been sleeping on the couch with J.R. when he became unconscious on September 2, 2015. As nurse Hite observed, mother should have known co-sleeping on soft surfaces was dangerous because she had already lost one child to SIDS. Even if mother were to claim she was never informed of the SIDS risk factors, she learned of the co-sleeping risks firsthand when J.R. fell off the bed and became tangled in cords.

Despite these experiences that should have taught her not to sleep with her infants, mother continued to do so.

Based on this evidence, the court could find mother's co-sleeping was negligent and caused J.R.'s death, either by way of SIDS or suffocation. In other words, the autopsy report was not critical because the court had sufficient information to make its bypass determination without it. As CFS points out in its brief, the autopsy report may end up being vital to the district attorney's case if mother is criminally prosecuted, but as section 352 states, a pending criminal prosecution is not "in and of itself [a] good cause" for a continuance. (§ 352, subd. (a).)

Next, mother contends her request for a continuance was based on the court's receipt of "new medical information" (i.e., J.R.'s retinal hemorrhaging chart) the "court and parties did not understand." Mother argues the court did not understand the document because the court described it as "some notes related to eyes." This argument lacks merit. Mother never raised any issue with the retinal chart below. She did not mention the chart in her request for a continuance and she did not object when minors' counsel asked to have it attached to the jurisdiction/disposition report. In any event, the chart is irrelevant to the court's bypass finding. The existence of retinal hemorrhages is relevant to whether J.R. suffered nonaccidental trauma, not whether J.R. died from SIDS or suffocation. Finally, we disagree the court was confused about the chart. We assume the court was familiar with the issue of retinal hemorrhaging as it was discussed at several points in CFS reports as an indication J.R. could have been severely shaken.

B. *ICWA Notice*

Mother argues the ICWA notices CFS sent to the tribes and the Bureau of Indian Affairs (BIA) for each of the girls were inadequate. We need to consider mother's claim only with regard to A.C. ICWA notice was not required for H.L. and E.W. because they were placed with their biological fathers. (25 U.S.C. § 1912(a); *In re O.K.* (2003) 106 Cal.App.4th 152, 155, as mod. Feb. 10, 2003 [ICWA's protections apply only to Indian children who are at risk of being removed from their families and placed "in foster or adoptive homes"].)

1. *Additional background*

At the detention hearing, mother claimed Cherokee descent through her paternal grandfather and Forrest claimed Cherokee descent through his paternal great-grandmother. CFS sent notices of the jurisdiction and disposition hearing to the BIA, the Secretary of the Interior, and the three federally-recognized Cherokee tribes (Cherokee Nation, Eastern Band of Cherokee Indians, and United Keetowah Band of Cherokee Indians). The notices contained information about A.C., mother, Forrest, and the maternal and paternal grandparents and great-grandparents. CFS stated that some of the information was "unknown" or "not available" and declared it had provided all of the information it had regarding A.C.'s relatives.

The United Keetowah Band of Cherokee Indians and the Eastern Band of Cherokee Indians responded to the notices by concluding A.C. was not eligible for enrollment. Cherokee Nation responded that A.C. was not an "Indian child," but a

"conclusive" determination required "the full names [including] maiden names, and dates of birth for the direct biological lineage linking the child to an enrolled member of the tribe." The tribe stated it was "impossible . . . to confirm or deny a claim of 'eligible for enrollment' without this information." If CFS "wish[ed] to send additional information" it should do so using the contact information Cherokee Nation had provided. According to the appellate record, CFS did not send any additional information to Cherokee Nation.

Based on the notices and CFS declarations of due diligence (which contained CFS's various search efforts), the court found CFS had given notice, the tribes had not affirmed tribal membership within the required 65-day period, and ICWA did not apply.

2. *Discussion*

Mother argues CFS had a duty to respond to Cherokee Nation's letter by "attempt[ing] . . . to obtain the missing information." Her specific claim of error is twofold: CFS failed to give Cherokee Nation (1) the date of birth for "James D.L., Mother's grandfather" and (2) the maiden name and date of birth for "Forrest C.'s great[-]grandmother, Patricia S."[6] The only relief she requests is for CFS to "indicate what efforts, if any, were used to attempt to obtain [that information]."

ICWA was enacted "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." (25 U.S.C. § 1902.) In general,

[6] We note Patricia S. is Forrest's grandmother not his great-grandmother. Forrest claimed he had Cherokee descent through his great-grandmother, however the ICWA notice (Judicial Council Forms, form ICWA-030) does not contain a space for information about the parents' great-grandparents.

ICWA applies to any state court proceeding involving the foster care or adoptive placement of, or the termination of parental rights to, an Indian child. (25 U.S.C. §§ 1903(1), 1911(a)-(c), 1912-1918, 1920-1921.)

Under ICWA's notice provision, if the court "knows or has reason to know that an Indian child is involved," the social services agency must "notify . . . the Indian child's tribe . . . of the pending proceedings and of their right of intervention." (25 U.S.C. § 1912(a).) The court and the county welfare department have "an affirmative and continuing duty to inquire whether a child is or may be an Indian child in all proceedings identified in rule 5.480," which includes proceedings under section 300. (Cal. Rules of Court, rules 5.480(1), 5.481(a).)

Notice, when given, must "contain enough information to permit the tribe to conduct a meaningful review of its records to determine the child's eligibility for membership." (*In re Cheyanne F.* (2008) 164 Cal.App.4th 571, 576.) CFS has "a duty to inquire about and obtain, *if possible*, all of the information about a child's family history" required under ICWA, i.e., the full names (maiden and married names and aliases), addresses, and dates and places of birth of those relatives with American Indian heritage. (*In re C.D.* (2003) 110 Cal.App.4th 214, 225, italics added; see also *In re S.M.* (2004) 118 Cal.App.4th 1108, 1116.) As soon as practicable, the social worker is required to interview the child's parents, extended family members, the Indian custodian, if any, and any other person who can reasonably be expected to have information concerning the

child's membership status or eligibility. (§ 224.3, subd. (c); *In re Shane G.* (2008) 166 Cal.App.4th 1532, 1539; Cal. Rules of Court, rule 5.481(a)(4).)

Mother cannot demonstrate that CFS failed to adequately investigate ICWA's application or that she had been harmed by the alleged inadequacy. The record contains no indication CFS's attempt to obtain A.C.'s familial information was inadequate. To the contrary, the notices CFS sent the tribes indicate that the social worker conducted interviews because they contained information about A.C., her parents, maternal and paternal grandparents, and maternal and paternal great-grandparents. The notices were substantially complete, and where CFS did not include certain information, it stated the information was "unknown" or "not available." These notations indicate CFS made an effort to obtain the information but was unable to for whatever reason. (See, e.g., *In re Aaliyah G.* (2003) 109 Cal.App.4th 939, 942 [where no indication to the contrary, the department's checking the box that ICWA does not apply suggests it made sufficient inquiry into ICWA's applicability]; *In re S.B.* (2005) 130 Cal.App.4th 1148, 1154 [same].) In the absence of evidence to the contrary, we presume CFS did not neglect its ICWA obligations. (See *In re L.B.* (2003) 110 Cal.App.4th 1420, 1425 [Evid. Code, § 664's presumption an "official duty has been regularly performed" bars the appellate court from indulging in speculation as to what ICWA information a social worker might have obtained in his or her contacts with relatives].)

While CFS has "an affirmative and continuing duty" to inquire about a child's Indian heritage whenever there is reason to know that the child may be an Indian child

(§ 224.3, subd. (a)), this duty is not unlimited. The information in the notices indicate CFS thoroughly interviewed mother and Forrest leading up to the jurisdiction and disposition hearing. Nothing in the record indicates new facts had emerged or mother or Forrest had new information to offer. In other words, "[n]othing in the record suggests any reasonable path of investigation [CFS] could have followed to track down additional information to flesh out father's claim of 'Cherokee' heritage." (*In re B.H.* (2015) 241 Cal.App.4th 603, 608 [no reason to order further inquiry into possible Indian heritage where record contains no indication of path to additional information]; see also *In re Christopher I.* (2003) 106 Cal.App.4th 533, 567 ["Any error on the part of [CFS] in this case would be harmless" as there was "[no] reason to believe more notices over more time will result in any more information"].)

It is true we cannot determine from the appellate record whether CFS followed up on Cherokee Nation's letter and asked mother and Forrest for the additional information. But mother is here, now, before this court. Nothing prevented her, in her briefing or otherwise, from removing any doubt about whether CFS had attempted to obtain the remaining familial information from her. If she knows any of the missing information (e.g., her grandfather's date of birth), she should have made an offer of proof or other affirmative representation that, had she been asked, she would have been able to provide CFS with additional information.

As this court has previously noted, "ICWA is not a 'get out of jail free' card dealt to parents of non-Indian children, allowing them to avoid a [juvenile court's] order by

withholding secret knowledge, keeping an extra ace up their sleeves. Parents cannot spring the matter for the first time on appeal without at least showing their hands. Parents unable to reunify with their children have already caused the children serious harm; the rules do not permit them to cause additional unwarranted delay and hardship, without any showing whatsoever that the interests protected by the ICWA are implicated in any way." (*In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1431 [no reversal required for alleged ICWA violations if parent cannot demonstrate prejudice].)

On this record, we cannot conclude CFS's ICWA investigation was inadequate. However, because this matter is still in the reunification phase and the court and CFS have a continuing duty to inquire whether a child may be an Indian child, nothing in this opinion precludes mother or Forrest from providing CFS with mother's grandfather's date of birth or Forrest's great-grandmother's maiden name and date of birth.

## III

## DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

SLOUGH
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.